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September 5, 2012

Anita S. Tekle, Town Clerk
Town of Concord
22 Monument Square
P.O. Box 535
Concord, MA 01742-0535

RE: Concord Annual Town Meeting of April 23-26, 2012– Case # 6273
Warrant Articles # 31, 32 (General)

Dear Ms. Tekle:

We approve the amendments to the Town by-laws adopted under Article 32, concerning "Drinking Water in Single-Serve PET Bottles." This letter briefly describes the by-law; discusses the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explains why, governed as we are by that standard, we are not persuaded by the arguments made to us that the by-law should be disapproved.[1] Our analysis is substantially influenced by the Supreme Court's decision in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), holding that a Minnesota law that banned the retail sale of milk in non-returnable, non-refillable plastic containers, in order to further the state's interest in reducing the generation of solid waste, did not violate the federal equal protection or due process clauses or unlawfully burden interstate commerce.

We emphasize that our approval in no way implies any agreement or disagreement with the policy views that led to the passage of the by-law. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with

[1] Along with Article 32, the Town submitted Article 31 (relating to non-criminal disposition of alleged violations of a by-law). We remind the Town that in a decision issued July 24, 2012, we approved Article 31. Pursuant to the authority granted by G.L. c. 40, § 32 as amended by Chapter 299 of the Acts of 2000, the time for the Attorney General's review of Article 32 was extended to September 16, 2012.

state and federal law, not on any policy views she may have on the subject matter or wisdom of the by-law. Amherst v. Attorney General, 398 Mass. 793, 795-96, 798-99 (1986). The state constitution's Home Rule Amendment, as ratified by the voters themselves in 1966, confers broad powers on individual cities and towns to legislate in areas that previously were under the Legislature's exclusive control. Towns have used these home-rule powers to prohibit, within their borders, certain commercial activities that state statutes generally recognize as lawful and that are widely accepted in the remainder of the Commonwealth--for example, coin-operated amusement devices, or self-service gas stations. Amherst, 398 Mass. at 798 n.8. The Supreme Judicial Court has upheld such by-laws, and has overturned the Attorney General's disapproval of them where they did not create any specific conflict with state law. Amherst, id.; see also Milton v. Attorney General, 372 Mass. 694, 695-96 (1977). The Attorney General thus has no power to disapprove a by-law merely because a town, in comparison to the rest of the state, has chosen a novel, unusual, or experimental approach to a perceived problem.

Also, our limited scope of review precludes us from making detailed factual evaluations of certain issues that may affect the validity of by-laws. Therefore, as noted later in this letter, our rejection, based on a limited factual record, of certain arguments against the validity of Article 32, does not foreclose later court challenges to Article 32 based on those same legal claims and a more fully developed record.

I. Description of Article 32

Section 1 of Article 32 declares, "It shall be unlawful to sell non-sparkling, unflavored drinking water in single-serving polyethylene terephthalate (PET) bottles of 1 liter (34 ounces) or less in the Town of Concord on or after January 1, 2013."

Section 2 provides an exemption for emergencies, declaring, "Sales occurring subsequent to a declaration of an emergency adversely affecting the availability and/or quality of drinking water to Concord residents by the Emergency Management Director or other duly-authorized Town, Commonwealth or United States official shall be exempt from this Bylaw until seven days after such declaration has ended."

Section 3 declares that enforcement of the by-law shall be the responsibility of the Town Manager or his/her designee, and it further provides that "[a]ny establishment conducting sales in violation of this Bylaw shall be subject to a non-criminal disposition fine as specified in Appendix A of the Regulations for the Enforcement of Town Bylaws under M.G.L. Chapter 40, §21D[.]" Article 32 also amends the referenced Appendix A to provide that a first violation shall be the subject of a warning; a second offense, a fine of $25; and a third or subsequent offense, a fine of $50.

Section 4 provides for suspension of the by-law in certain circumstances. "If the Town Manager determines that the cost of implementing and enforcing this Bylaw has become unreasonable, then the Town Manager shall so advise the Board of Selectmen and the Board of Selectmen shall conduct a Public Hearing to inform the citizens of such costs. Subsequent to the Public Hearing, the Board of Selectmen may continue this Bylaw in force or may suspend it permanently or for such length of time as they may determine."

II. The Attorney General's Standard of Review

Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Id. at 796.[2] "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973) (emphasis added). "The legislative intent to preclude local action must be clear." Id. at 155.

III. Challenges to the Validity of Article 32

We have received numerous letters from citizens and organizations raising various challenges to the validity of Article 32. Although, as discussed below, we are unable to agree that any of these arguments furnishes a basis for disapproval of the by-law, we greatly appreciate these submissions, which have substantially assisted us in our review. We also appreciate the numerous letters from citizens and organizations offering legal arguments in support of Article 32. Finally, we acknowledge the many letters from citizens and businesses in Concord expressing, on policy grounds, either support for or opposition to the Article 32. While we cannot base our decision on such policy arguments, the letters have helped inform our understanding of the issue and its importance to the Town.

A. Procedural Challenges

1. Assertedly Misleading Language on the Town Meeting Warrant

It has been argued that Article 32 is procedurally invalid on the ground that certain assertedly misleading language regarding Article 32 was contained in the Town Meeting warrant. That language stated, "A 'yes' vote on this Article will allow the bylaw to be sent to the State of Massachusetts Office of the Attorney General for review." It has been argued that voters at Town Meeting, in voting "yes," could have thought they were merely voting to send

[2] The Attorney General also reviews by-laws for consistency with the federal constitution and statutes. This is because towns draw their legislative power from the state's Home Rule Amendment, Mass. Const. amend. art. 2, § 6 (as amended by amend. art. 89), which allows a town to exercise, subject to certain limits, "any power or function which the general court has power to confer upon it," and the Legislature has no power to confer on a town the power to enact by-laws contrary to federal law.

text to this Office for review, rather than voting to enact an actual by-law. For the reasons set forth below, we conclude that the language on the warrant provides no basis for us to disapprove Article 32.

First, it is important to understand the context in which the quoted language appeared -- not as a part of the warrant article itself, but as explanatory text that followed the article and that was not required by the statute governing the contents of warrants. As it appeared on the warrant, Article 32 stated (with emphasis added) that its purpose was "[t]o determine whether the Town of Concord will vote to amend the Town Bylaws by adding a provision for the sale of drinking water in PET bottles, as follows [with the proposed text of Article 32 set forth verbatim] or take any other action relative thereto." There followed a printed box containing this explanatory text (with emphasis added):

> In April 2011, the vote on Article 38: Drinking Water in Single-Serving PET Bottles Bylaw was very close (within 7 votes). This year's article is very similar to the 2011 article. It is formatted as a bylaw, focuses on drinking water in single-serve plastic bottles (only) and provides a flexible means of enforcement. It continues to provide an exemption during a declared State of Emergency and empowers the Town to determine direction should the cost of the bylaw become unreasonable. A 'yes' vote on this Article will allow the bylaw to be sent to the State of Massachusetts Office of the Attorney General for review.

No challenge is made to the accuracy of the first three sentences of the explanation, setting forth some of the procedural history of the effort to ban the sale of drinking water in single-serving PET bottles in Concord. Nor is the literal accuracy of the final sentence challenged, in the sense that there is no disagreement that a "yes" vote would allow the text to be sent to this Office for review. What is challenged is whether voters also understood that this Office's review could result in an actual by-law taking effect. This would contrast with what occurred in 2010, when certain language concerning sales of bottled water was approved by Town Meeting and sent to this Office for review, but, since it was not formatted, phrased, or labeled as a bylaw, returned without action by this Office (see Letter to Town Clerk, Case #5555, July 9, 2010), thus leading to revised efforts in 2011 and again in 2012.

The relevant statute requires in pertinent part that "[t]he warrant for all town meetings shall state the time and place of holding the meeting and the subjects to be acted upon thereat." G.L. c. 39, § 10. "This means only that the subjects to be acted upon must be sufficiently stated in the warrant to apprise voters of the nature of the matters with which the meeting is authorized to deal. It does not require that the warrant contain an accurate forecast of the precise action which the town meeting will take on these subjects." Johnson v. Town of Framingham, 354 Mass. 750, 753 (1968) (citations and internal quotations omitted). "Warrants are held sufficient if they indicate with substantial certainty the nature of the business to be acted on." Coonamessett Inn v. Chief of Falmouth Fire Department, 16 Mass. App. Ct. 632, 634 (1983) (citation and internal quotations omitted).

Here, the warrant plainly indicated that the purpose of Article 32 was "[t]o determine whether the Town of Concord will vote to amend the Town Bylaws" relative to the sale of drinking water in PET bottles. And the explanatory language in the box printed after Article 32

used the term "bylaw" in no fewer than four places – including (with emphasis added) that "[a] 'yes' vote on this Article will allow the bylaw to be sent to the State of Massachusetts Office of the Attorney General for review." We have no reason to believe that voters thought the purpose of Article 32 was anything other than to enact a by-law that, if approved by the Attorney General, would take effect--unlike the 2010 language that (as we may presume voters were aware) was reviewed but not acted upon by this Office and never took effect as a by-law.

Moreover, the certified copy of the vote taken under Article 32 at Town Meeting, sent to us by the Town pursuant to G.L. c. 40, §32, states (with emphasis added), "On a MOTION made by Jean Hill and duly seconded, the following was VOTED (with 403 voting in favor and 364 opposed): To amend the Town Bylaws by adding a provision for the sale of drinking water in PET bottles, as follows," after which the full text of the new by-law (which clearly refers to itself as such) was set forth. We must presume that this certified copy accurately reflects what occurred at Town Meeting. The Attorney General's review of a by-law is based primarily if not exclusively on the materials that G.L. c. 40, § 32, requires a town to submit: "a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with." Any inquiry into whether voters were materially confused or misled by the explanatory text following Article 32 on the warrant would involve consideration of evidence and determination of factual issues going well outside the bounds envisioned by G.L. c. 40, § 32. Accordingly, we conclude that the inclusion of the explanatory text furnishes no basis for us to disapprove Article 32.[3]

2. Asserted Failure to Adhere to Concord's By-Laws Governing Motions to Reconsider

It has been argued that we should disapprove Article 32 based on certain events that assertedly occurred after the initial Town Meeting vote to approve it. None of these events are reflected--or required to be reflected--on the materials submitted to us by the Town. According to a letter that asks us to disapprove Article 32, however, after the initial vote, the Town Moderator gave a confusing explanation of the process and timing for reconsideration of that vote. As related to us, a vote on reconsideration was taken that same evening (instead of at the Town Meeting session scheduled to occur the following evening, as the voter calling for reconsideration assertedly requested), resulting in a decision not to reconsider. Based on how the voter is said to have characterized his request for reconsideration, it has been argued to us that the Town's "Town Meeting Bylaws"[4] required the Moderator to postpone reconsideration until the following evening, and that his decision not to do so invalidates Town Meeting's approval of Article 32.

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[3] The determination of these issues is best left for a court, which, if a case were properly initiated, would be better equipped to find the facts on a full record and determine the appropriate remedy for any errors found to have occurred.

[4] See http://www.concordma.gov/Pages/ConcordMA_Bylaws/Town%20Meeting%20Bylaws.pdf (last visited July 17, 2012).

Even based on how the events have been described to us in the letter urging disapproval of Article 32, the Moderator's actions regarding the reconsideration request appear to have been consistent with Concord's "Town Meeting Bylaws." However, we need not and do not reach any final conclusion on that issue, because it is beyond the scope of our review under G.L. c. 40, § 32. Although, as noted above, that statute requires the Town to submit "adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with," the Attorney General interprets the phrase "procedural requirements" in G.L. c. 40, § 32, to refer primarily if not exclusively to those established by statute as basic conditions essential to the validity of Town Meeting action. It does not encompass all possible procedural requirements (such as by-laws or rules of order) that might govern the conduct of Town Meeting itself.

The Attorney General has never interpreted the statute to require submission of a detailed exposition of all motions made, moderator explanations and rulings issued, and votes taken in relation to a by-law, or how such actions were consistent with local procedural requirements. As already explained above with regard to the explanatory language in the warrant, our review of alleged non-compliance with local procedural requirements, including the materiality of any such non-compliance to the overall validity of the by-law approval process, would in many cases (including this one) involve consideration of evidence and determination of factual issues going outside the bounds of G.L. c. 40, § 32. Accordingly, we conclude that the alleged noncompliance with the Town's by-laws governing reconsideration of matters at Town Meeting furnishes no basis for us to disapprove Article 32.

B. Substantive Challenges

1. Federal and State Equal Protection and Substantive Due Process

We have considered the argument that Article 32 violates federal and state constitutional guarantees of the equal protection of the laws--that is, that Article 32 is invalid because it is not "rationally related to the furtherance of a legitimate State interest." Massachusetts Federation of Teachers v. Board of Education, 436 Mass. 763, 777 (2002) (citation and internal quotations omitted) ("MFT").[5] We have also considered the closely related argument that Article 32 violates federal and state constitutional guarantees of substantive due process--that is, that Article 32 bears no "reasonable relation to a permissible legislative objective," or no "real and substantial relation to the public health, safety, morals, or some other phase of the general

[5] The standard for equal protection analysis under the state constitution is the same as under the federal constitution's Fourteenth Amendment. MFT, 463 Mass. at 77; see Gillespie v. City of Northampton, 460 Mass. 148, 158 (2011). Where "a statute implicates a fundamental right or uses a suspect classification, we employ strict judicial scrutiny[; for] all other statutes, we employ the rational basis test." Commonwealth v. Weston W., 455 Mass. 24, 30 (2009) (citations and internal quotations omitted); see MFT, 463 Mass. at 777. There is no argument here that Article 32 implicates a fundamental right or uses a suspect classification.

welfare." MFT, id. at 779 (citation and internal quotations omitted).[6] For the following reasons, we are unable to accept these arguments. Cf. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (holding that there was rational basis for state statute banning retail sale of milk in plastic non-returnable, non-refillable containers, but permitting such sale in other nonreturnable, non-refillable containers, such as paperboard milk cartons).

To show that a law lacks a rational basis is a "heavy burden." Leibovich v. Antonellis, 410 Mass. 568, 576 (1991). "A legislative enactment carries with it a presumption of constitutionality, and the challenging party must demonstrate beyond a reasonable doubt that there are no conceivable grounds which could support its validity." Id. (citation and internal quotations omitted). "A classification will be considered rationally related to a legitimate purpose if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." MFT, 436 Mass. at 777 (citations and internal quotations omitted).

Here, for equal protection purposes, the most obvious "classification" made by Article 32 is between "non-sparkling, unflavored drinking water in single-serving polyethylene terephthalate (PET) bottles of 1 liter (34 ounces) or less," sales of which are banned by Article 32, and other beverages in such bottles, sales of which will still be permitted. This classification appears rationally related to the legitimate governmental interest in reducing the generation of solid waste, in the form of plastic bottles, that must be recycled or otherwise disposed of.[7] Unlike other beverages, non-sparkling, unflavored drinking water is available from faucets in virtually every home, workplace, and public building in the Town, as well as in various outdoor locations. It is "reasonably conceivable," MFT, 436 Mass. at 777, that persons who are unable to buy such water in the Town in PET bottles of one liter or less will instead obtain such water from faucets and either drink it directly (e.g. from cups or glasses) or put it into other types of portable containers--ones that either (1) are intended for re-use (i.e., re-filling) and will be re-used, or (2) have in fact been re-used, after originally having been filled with water (prior to Article 32's effective date) or with some other beverage. Such re-used containers in this second category may include both containers that are subject to the Bottle Bill, G.L. c. 94, §§ 321-327 (and thus carry a financial incentive for recycling), and containers that are not. But even if these latter containers are not ultimately recycled, their temporary re-use can rationally be thought to have contributed to some reduction in the total generation of the beverage-container component of solid waste in the Town.

Of course, it is also possible that persons who desire the convenience of having drinking water in lightweight disposable bottles of one liter or less will simply purchase such water in PET bottles in near-by municipalities, and then bring such bottles back to the Town, where they

[6] The federal and state substantive due process guarantees are largely coextensive. Id. n.14.

[7] The Town's undoubted interest in managing solid waste generated within its borders is shown by various Town programs aimed at reducing, reusing, and recycling materials that would otherwise end up as waste, and for collecting and disposing of waste from residents. See http://www.concordma.gov/Pages/ConcordMA_Recycle/curbside (last visited August 1, 2012).

may end up in the solid waste stream. Or persons who generally desire the convenience of having non-carbonated beverages in lightweight disposable bottles of one liter or less will simply purchase beverages other than plain drinking water (e.g., juices, sports drinks) in PET bottles in the Town, where again they may end up in the solid waste stream.[8] Although in these respects Article 32 is under-inclusive, we cannot say that it is irrationally under-inclusive. To address the first issue would require the Town to ban the possession (rather than merely the sale) of drinking water in PET bottles of one liter or less, a measure that, assuming for purposes of argument that it were within the Town's power, would be much more difficult to enforce. To address the second issue would require the Town to ban sales of these other beverages in bottles of the type in question--even though (unlike drinking water) such beverages are not available out of faucets. This would create a much more substantial barrier to residents obtaining lawful beverages of their choice.

The constitutional guarantee of equal protection does not require that legislative classifications be perfect. "If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. . . . Some degree of overinclusiveness or underinclusiveness is constitutionally permissible in this regard. . . . [A legislative body] is permitted to deal with problems one step at a time . . . [I]n confronting a multitude of evils, it may address itself to the phase of the problem most urgently requiring remedial action." MFT, 436 Mass. at 778 (citations and internal quotations omitted). "[E]qual protection does not require [the] State to choose between attacking every aspect of a problem or not attacking the problem at all"; a legislative body "may proceed one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Id. (citations and internal quotations omitted).

It is also possible that Article 32 will result in persons within the Town purchasing assertedly less healthy, sweetened beverages instead of plain water—whether in containers that are subject to the Bottle Bill, such as soda,[9] or in containers that are not, such as juice or sports drinks. Similarly, it has been argued that Article 32 will interfere with the ability of institutions such as Emerson Hospital to serve, in convenient form, what may be the healthiest beverage in existence--plain water--to its patients, visitors, and staff. But, in these circumstances, whether

[8] Also, Article 32 arguably classifies between drinking water in PET bottles of one liter or less, and drinking water in bottles of one liter or less made of other types of plastic, that would not be subject to the Bottle Bill, yet are not banned by Article 32, and so might end up in the Town's solid waste stream. It has not been argued to us, nor are we independently aware, that drinking water is commonly sold in this latter type of bottle. Even if it were, this would appear to raise an issue of under-inclusivity of the type that, as explained in the text, is insufficient to invalidate a legislative enactment on equal protection grounds.

[9] It could rationally be thought that despite the health implications of such beverages, they at least have the virtue of being sold in containers that, because they are subject to the Bottle Bill, are more likely to be recycled.

Article 32 strikes the proper balance between solid waste reduction and public health is not relevant to the equal protection analysis. The question is "whether the statute falls within the legislative power to enact, not whether it comports with a court's idea of wise or efficient legislation." Leibovich, 410 Mass. at 576 (citations and internal quotations omitted). "The rational basis test does not require that we agree with the Legislature's classification[]," so long as there is a conceivable rational basis for it. Harlfinger v. Martin, 435 Mass. 38, 50 (2001); see U.S. v. Carolene Products Co., 304 U.S. 144, 154 (1938) (where "the question is at least debatable," court may not substitute its judgment for that of legislative body). Again, a legislative body "may address itself to the phase of the problem most urgently requiring remedial action." MFT, 436 Mass. at 778 (citations and internal quotations omitted). We acknowledge that the Town's Board of Health expressed the view (in a 2010 letter to the Board of Selectmen) that a measure banning bottled water sales "lacks the core elements of a public health initiative." But it is for the Town as a whole to decide, as policy matter, how to balance the effects of beverages sold in small containers on the Town's interest in reducing solid waste, on the one hand, and the Town's interest in promoting public health on the other.

Much the same may be said for the argument that Article 32 will cause Town residents to travel to neighboring municipalities to purchase bottled water and, perhaps, do other shopping as well, to the overall detriment of merchants in (and the economic wellbeing of) the Town. Such an effect is foreseeable, but it would not violate the equal protection clause. It is for the Town to decide, as a policy matter, whether the solid waste problem posed by bottled water should be addressed despite the risk to the viability of merchants within the Town. In a similar vein, it has been argued that Article 32 irrationally interferes with emergency preparedness and the ability to respond quickly to emergencies that might cut off access to tap water. Even if Article 32 made no allowance for bottled water sales in emergencies (as it does in Section 2), and even if drinking water were not available for consumer purchase in containers that are not banned by Article 32,[10] as an equal protection matter it is for the Town to balance the competing considerations of solid waste generation and emergency preparedness and response.

It has also been suggested that, apart from solid waste reduction at the local level, some of the arguments in favor of Article 32 that were assertedly offered at Town Meeting are not rationally related to the furtherance of any legitimate interest of the Town. Cf. MFT, 436 Mass. at 777. Although we have no independent knowledge of what was said at Town Meeting, these arguments assertedly included the ideas that Article 32 would make a symbolic statement that could gain attention at the state or national levels; that PET bottles may be harmful to human

[10] We take notice that drinking water is commercially available in plastic bottles holding five gallons, (http://www.polandspringhomedelivery.com/water-delivery.cfm); four gallons, (http://www.costco.com/Browse/Product.aspx?Prodid=11676505&whse=BC&Ne=4000000&eCat=BC|3605|90020|90021&N=4043619&Mo=7&No=5&Nr=P_CatalogName:BC&cat=90021&Ns=P_Price|1||P_SignDesc1&lang=en-US&Sp=C&hierPath=3605*90020*90021*&topnav=); one gallon (http://www.peapod.com/itemDetailView.jhtml?productId=56717&NUM=1343079356270); and three liters, (http://www.peapod.com/itemDetailView.jhtml?productId=127110&NUM=1343079356268) (all last visited July 23, 2012).

health; that PET bottles consume scarce crude oil in their manufacture; that bringing bottled water to the Town by truck, where tap water is already widely available, further wastes energy and other resources and creates unnecessary noise and air pollution in the Town; and that Article 32 could help reduce the amount of trash floating in the Pacific Ocean. We express no view on whether these possible goals of Article 32 are legitimate Town interests, or whether Article 32 rationally furthers them. The question for equal protection purposes is not whether a law furthers all of the purposes that may have been articulated for it, but whether a court can "visualize possible legitimate public purposes for the legislation"; "in the absence of a factual record establishing the lack of any conceivable rational basis for the legislation," a court must conclude that the statute satisfies equal protection requirements. Opinion of the Justices, 401 Mass. 1211, 1219 (1987) (emphasis added); see Comm. v. Henry's Drywall Co., 366 Mass. 539, 543 (1974). Cf. Cloverleaf Creamery, 449 U.S. at 465 (if any one of four asserted bases for statute banning sale of milk in non-returnable plastic containers was rational, Court was required to uphold statute).[11] Moreover, "it is irrelevant for constitutional analysis whether a reason now advanced in support of a statutory classification is one that actually motivated the Legislature." Prudential Ins. Co. v. Comm'r of Revenue, 429 Mass. 560, 568 (1999) (citing FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993)).

For essentially the same reasons, we conclude that Article 32 does not violate state and federal constitutional guarantees of substantive due process. See MFT, 436 Mass. at 779 & n.14 (treating equal protection rational basis analysis as essentially dispositive of substantive due process analysis); Chebacco Liquor Mart, Inc. v. ABCC, 429 Mass. 721, 724 (1999) (same). We cannot conclude that Article 32 bears no "reasonable relation to a permissible legislative objective," or no "real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." MFT, 436 Mass. at 779 (citation and internal quotations omitted). Cf. Cloverleaf Creamery, 449 U.S. at 470 n.12 (given Court's conclusion that Minnesota statute banning retail sale of milk in non-refillable plastic containers had rational basis for equal protection purposes, "it follows a fortiori that the Act does not violate the Fourteenth Amendment's Due Process Clause").

It has been suggested that Article 32 violates the state substantive due process guarantee as applied in Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 422-26 (1965) (invalidating, as having "no rational basis," statute that completely prohibited sale within Commonwealth of non-dairy coffee creamer, an "admittedly wholesome" food product). But the fact that a product is "admittedly wholesome" does not end the inquiry here, any more than it did in Coffee-Rich. In that case the court, having concluded that the product was wholesome and thus that there was no rational public health basis for banning its sale, id. at 422-23, went on to consider whether there was a consumer-protection basis for doing so. Id. at 423-25. Although the court rejected that argument as well, id., here the argument is that the Town's interest in reducing its generation of solid waste is a legitimate goal that is rationally furthered by Article

[11] In Cloverleaf Creamery, the state of Minnesota's asserted rational bases were related to environmental protection, energy conservation, and the state's solid waste disposal problem. 449 U.S. at 465-70. The Court ruled that each of the asserted bases was rational.

32. Nothing in Coffee-Rich either (1) establishes that the sale of wholesome products may never be banned or (2) otherwise negates the legitimacy of Article 32's goals or the rationality of its means.

Moreover, Article 32 does not ban the sale of drinking water. It bans the sale of drinking water only in one specific type of bottle, which the Town has concluded creates a particular, and readily avoidable, solid waste problem. Cf. Coffee-Rich, 348 Mass. at 424-25 (noting that, to the extent a ban on sale of product was aimed at protecting consumers, there was a "less arbitrary . . . and particularly obvious" alternative to a complete ban). For these reasons, we conclude that Article 32 is consistent with state, as well as federal, substantive due process guarantees.

2. Commerce Clause

We have considered whether Article 32 impermissibly burdens interstate commerce, in violation of the so-called "dormant Commerce Clause." "The Commerce Clause provides that 'Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States.' U.S. Const., Art. I, § 8, cl. 3. Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 338 (2007) (plurality opinion). This is the "so-called 'dormant' aspect of the Commerce Clause[.]" Id. Here, on the limited record available to the Attorney General under G.L. c. 40, § 32, we conclude that Article 32 does not violate the dormant Commerce Clause.

a. Discrimination Against Interstate Commerce

The first question is whether Article 32 "discriminates on its face against interstate commerce." United Haulers, id. "In this context, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. . . . Discriminatory laws motivated by simple economic protectionism are subject to a virtually per se rule of invalidity[.]" Id. (citation and internal quotations omitted). "A court may find that a state law constitutes economic protectionism on proof either of discriminatory effect . . . or of discriminatory purpose[.]" Clover Leaf Creamery, 449 U.S. at 471 n.15 (citations omitted).

Here, we see nothing in Article 32 that facially discriminates against interstate commerce, nor are we aware that Article 32 has the purpose or effect of discriminating against interstate commerce. The ban on sales of drinking water in certain plastic bottles involves no discernible "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." United Haulers, 550 U.S. at 338. The ban applies whether the bottles and the water they contain originate in the Commonwealth or elsewhere, and, based on the limited facts available to us, we have no reason to think that the effect on in-state economic interests will be any less than the effect on out-of-state interests.

It has been suggested to us that Article 32 "discriminates against interstate commerce by restricting the sale of drinking water in Concord sold by sources other than the [T]own itself" through its municipal water and sewer division.[12] According to this argument, Article 32 discriminates in favor of a single vendor--the Town--and it makes no difference that Article 32 discriminates against in-state wholesalers or distributors (that is, Massachusetts businesses that sell bottled water to Town merchants for ultimate re-sale to consumers) as well as out-of-state wholesalers or distributors. The argument is based on Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 & n.4 (1951) (invalidating, on Commerce Clause grounds, ordinance banning sale of milk as "pasteurized" unless it had been processed and bottled at an approved pasteurization plant within five miles of city; it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce").

We do not find this argument persuasive. First, Article 32 does not ban all sales of drinking water by commercial entities so as to clear the way for the Town to dominate the market. Rather, commercial entities, whether from the Commonwealth or elsewhere, remain free to sell drinking water, so long as they do not sell it in PET bottles of one liter or less--and the Town is likewise barred from selling drinking water in such bottles. Cf. Clover Leaf Creamery. 449 U.S. at 471-72 ("Minnesota's statute does not effect 'simple protectionism,' but 'regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State").

Second, in Dean Milk, the Court characterized the challenged ordinance as "erecting an economic barrier protecting a major local industry against competition from without the State," and thus "Madison plainly discriminate[d] against interstate commerce." 340 U.S. at 354. Here, in contrast, the Town's water and sewer department is not a "major local industry" that Article 32 aims to protect from competition. Even if Article 32 were viewed as benefiting the Town, "ordinances [that] benefit a clearly public facility, while treating all private companies exactly the same . . . do not discriminate against interstate commerce for purposes of the dormant Commerce Clause." United Haulers, 550 U.S. at 342 (emphasis added). "Compelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors." Id. (emphasis added). "Laws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism," e.g., goals related to solid waste disposal. Id. at 343. The Dean Milk case, in contrast, "involved discrimination in favor of private enterprise" and "is readily distinguishable on [that] ground." United Haulers, id. at 340 & n.4.

b. Excessive Burden on Interstate Commerce

That we cannot find Article 32 to discriminate against interstate commerce does not end our inquiry. "Even if a statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on

[12] See http://www.concordma.gov/Pages/ConcordMA_Water/index (last visited July 24, 2012).

such commerce is clearly excessive in relation to the putative local benefits.'" Clover Leaf Creamery, 449 U.S. at 471 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). "Moreover, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'" Id. (quoting Pike).

Here, the absence of any detailed, undisputed factual record necessarily limits the extent of our review. We cannot say either what absolute amount or what proportion of the bottled water that would be subject to Article 32 originates in other states, and thus we cannot evaluate the extent of the burden on interstate commerce. But we cannot merely assume that the burden is so great as to be "clearly excessive in relation to the putative local benefits."[13] Pike, 397 U.S. at 142 (emphasis added).

Whether Town residents respond to Article 32 by obtaining drinking water from their faucets, or by purchasing beverages in containers that are subject to the Bottle Bill and thus are more likely to be recycled, we cannot second-guess the apparent conclusion of Town Meeting that Article 32 will reduce the number of PET bottles of one liter or less that are introduced into the solid waste stream. It may be that some Town residents will respond to Article 32 in part by going elsewhere to purchase drinking water in PET bottles of one liter or less and bringing them into the Town, or in part by purchasing types of beverages that are not subject to the Bottle Bill, which in either case could result in additional beverage containers being introduced into the Town's solid waste stream. Nevertheless, we cannot simply assume that this will offset or significantly diminish the reduction in solid waste generation due to Article 32.

This is because, "under Pike, it is the putative local benefits that matter. It matters not whether these benefits actually come into being at the end of the day." Pharmaceutical Care Mgt. Ass'n v. Rowe, 429 F.3d 294, 313 (1st Cir. 2005), cert. denied, 547 U.S. 1179 (2006) (emphasis in original) (rejecting dormant Commerce Clause challenge). A dormant Commerce Clause claim cannot be based on "second-guess[ing] the empirical judgments of lawmakers concerning the utility of legislation." CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 92 (1987) (citations and internal quotations omitted). The focus is on the "hoped-for local benefits" of the local enactment. Wine and Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 15 (1st Cir.) (emphasis added), cert. denied, 552 U.S. 889 (2007).

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[13] The Court's analysis in Clover Leaf Creamery is illustrative, although not dispositive here. There, the Court said, "The burden imposed on interstate commerce by the statute is relatively minor. Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of containers, . . . the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. . . . Within Minnesota, business will presumably shift from manufacturers of [the banned plastic] containers to producers of [other containers], but there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms." Clover Leaf Creamery, 449 U.S. at 472-73 (citations omitted).

In Clover Leaf Creamery, the Court concluded that even if Minnesota's ban on sales of milk in non-refillable plastic containers burdened an out-of-state industry more than an in-state industry,

> we find that this burden is not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis. . . . We find these local benefits ample to support Minnesota's decision under the Commerce Clause.

449 U.S. at 473; cf. United Haulers, 550 U.S. at 346-47 (upholding solid waste ordinances under Pike test, based in part on substantial benefits to local recycling efforts; waste disposal is "a typical and traditional concern of local government"). Here, similarly, based on the limited facts before us, we cannot say that Article 32 causes such a manifestly greater harm to out-of-state than in-state economic interests that it "clearly" outweighs the Town's "substantial . . . interest" in reducing its solid waste disposal problem.

The final part of the dormant Commerce Clause inquiry is whether the local interest "could be promoted as well with a lesser impact on interstate activities." Pike, 397 U.S. at 142. In Clover Leaf Creamery, the Court concluded that no such equally effective, less burdensome alternative approach was available. Although the parties challenging Minnesota's ban on selling milk in non-refillable plastic containers had "suggested several alternative statutory schemes, . . . these alternatives [were] either more burdensome on commerce than the Act (as, for example, banning all nonreturnables) or less likely to be effective (as, for example, providing incentives for recycling)." Clover Leaf Creamery, 449 U.S. at 473-74. The Court's observation that "providing incentives for recycling" was "less likely to be effective" was evidently based on the Minnesota Legislature's express statement of its purpose in banning the non-refillable plastic containers: that "recycling of solid waste materials is one alternative for the conservation of material and energy resources, but it is also in the public interest to reduce the amount of materials requiring recycling or disposal." Id. at 459 n.2 (quoting Minnesota statute) (emphasis added).

Here, similarly, based on the limited record, we are unaware of alternatives that would cause Article 32 to fail the final part of the Pike test. If the Town banned sales of all beverages in PET bottles of one liter or less, the result would presumably be a greater impact on interstate commerce. And even if the Town acting alone could provide greater incentives to recycle drinking water PET bottles of one liter or less,[14] that would not necessarily be equally effective

[14] It is unclear how the Town could do so. It is very doubtful that the Town could require a deposit on such bottles; the state Bottle Bill imposes deposits to encourage recycling of "beverage containers," but its definition of "beverage" does not include drinking water (see G.L. c. 94, § 321), and the Bottle Bill's operation could easily be disrupted if cities and towns imposed deposits on additional types of containers. Moreover, imposing a deposit on bottled water sold in the Town, but not elsewhere in the Commonwealth, could create non-uniform labeling requirements that might themselves increase the burden on interstate commerce.

in furthering the Town's apparent goal of reducing the amount of packaging materials requiring recycling or disposal in the first place. This is a goal that may rationally be imputed to the Town, given Article 32's focus on a beverage that is readily available without any packaging materials at all, i.e., out of faucets.

Application of the Pike test frequently requires factual records and findings. E.g., United Haulers, 550 U.S. at 346 (finding no dormant Commerce Clause violation under Pike test, where "[a]fter years of discovery," trial court "could not detect any disparate impact on out-of-state as opposed to in-state businesses"); Clover Leaf Creamery, 449 U.S. at 472-74; Pike, 397 U.S. at 149-56. Here, we do not have the benefit of stipulations, findings, or officially noticeable facts regarding the extent of Article 32's effect on interstate commerce as compared to its hoped-for local benefits. Because Article 32 comes to us with a presumption of validity, Amherst, 398 Mass. at 795-96, and because invalidation under the Pike test would require us to conclude that Article 32's burden on interstate commerce is "clearly excessive" in relation to its putative local benefits, we cannot find that Article 32 violates the dormant Commerce Clause. Our conclusion does not and cannot, of course, foreclose such a challenge in court, based on a fuller factual record.

3. Preemption by Federal Law

Under the federal constitution's Supremacy Clause, Article VI, cl. 2, federal law may supersede, or "preempt," the effect of state law (including municipal law). This may occur in any of three ways. "State action may be foreclosed by express language in a congressional enactment, . . . by implication from the depth and breadth of a congressional scheme that occupies the legislative field, . . . or by implication because of a conflict with a congressional enactment . . . ." Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540-541 (2001) (citations omitted). Where "federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." California Div. of Labor Standards Enforcement v. Dillingham Construction NA, Inc., 519 U.S. 316, 325 (1997) (citations and internal quotations omitted).

It has been argued to us that Article 32 is preempted by the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-399d, which authorizes the federal Food and Drug Administration (FDA) to establish standards of identity, labeling, and quality for foods (including bottled drinking water), and which, in 21 U.S.C. § 343-1(a), expressly preempts non-identical standards established by states and political subdivisions. The FDA has established "standard of identity" regulations (21 CFR § 165.110(a)), which define different types of bottled drinking water such as spring water and mineral water, and "standard of quality regulations" (21 CFR § 165.110(b)), which establish allowable levels for contaminants in bottled drinking water. The FDA has also established Current Good Manufacturing Practice (CGMP) regulations for the processing and bottling of bottled drinking water (21 CFR Part 129),[15] and generally applicable

[15] These bottled water CGMP regulations, as well as the relevant portions of CGMPs for foods generally as set forth in 21 CFR Part 110, "apply in determining whether the facilities, methods, (footnote continued)

food labeling requirements (21 CFR Part 101) that apply to bottled water.

Although these federal requirements are extensive and detailed, we find nothing in Article 32 that conflicts with them. Article 32 does not establish any standard for the identity, quality, or labeling of bottled water. Nor do we find anything in any of the cited federal regulations that mandates that bottled water be sold in PET bottles of one liter or less. Simply put, the FDA requirements applicable to bottled water are aimed at ensuring consumer knowledge, health, and safety--not at ensuring that bottled water be available in types of containers that consumers may desire, or types of containers that may have some impact on the generation of solid waste.[16] It has not been argued to us, nor can we independently determine, that it is impossible or impractical to comply with both the FDA regulations and Article 32, nor do the FDA regulations "occupy the field" of regulation of bottled water packaging. We therefore conclude that those regulations, and the preemption language in 21 U.S.C. § 343-1(a), do not preempt Article 32.

4. Preemption by State Law

As noted earlier, the Attorney General must disapprove a by-law if it conflicts with state law. Amherst, 398 Mass. at 796. Municipalities have "considerable latitude" in legislating, and so there must be a "sharp conflict" with state law before a local enactment may be disapproved. Bloom, 363 Mass. at 154. "The legislative intent to preclude local action must be clear." Id. at 155.

"This intent can be either express or inferred." St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in essentially three instances, paralleling the three categories of federal preemption: (1) where the "Legislature has made an explicit indication of its intention in this respect"; (2) where "the State legislative purpose can[not] be achieved in the face of a local by-law on the same subject"; or (3) where "legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field." Wendell v. Attorney General, 394 Mass. 518, 524 (1985). "The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be

(footnote continued)

practices, and controls used in the processing, bottling, holding, and shipping of bottled drinking water are in conformance with or are operated or administered in conformity with good manufacturing practice to assure that bottled drinking water is safe and that it has been processed, bottled, held, and transported under sanitary conditions."

[16] The same is true of another FDA regulation, 21 C.F.R. § 177.1630, which appears to provide that PET is safe for use in contact with food, and which may thereby (although not explicitly) allow PET to be used to manufacture bottles for drinking water.

achieved in the face of a local ordinance or by-law on the same subject[.]" Bloom, 363 Mass. at 156; see Wendell, 394 Mass. at 527-28 ("It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute. . . . The question . . . is whether the local enactment will clearly frustrate a statutory purpose.").

a. Executive Office of Energy and Environmental Affairs Statutes

It has been suggested that Article 32 is preempted by general statutes concerning the responsibilities of the state Executive Office of Energy and Environmental Affairs (EOEEA). Those statutes, among other things, direct EOEEA to "provide for the management of air, water and land resources to assure the protection and balanced utilization of such resources within the commonwealth, realizing that providing safe water to drink and clean air to breathe is a basic mandate" (G.L. c. 21A, § 2(2)); and to "encourage recycling, resource recovery and environmentally sound purchasing practices to conserve resources and reduce waste[.]" Id. § 2(19). Although these statutory responsibilities are broad, we find in them nothing that explicitly preempts local law, nothing that conflicts with Article 32, and no intention to "occupy the field" of solid waste reduction and thereby preclude municipal efforts towards that goal.

b. Bottle Bill

We have also considered the possible preemptive effect of the Bottle Bill, G.L. c. 94, §§ 321-327, and its associated regulations, 301 CMR §§ 4.01-4.09. No doubt the law and regulations represent a comprehensive approach to the creation of financial incentives for consumers to return beverage containers so they may be recycled.[17] The Bottle Bill and its regulations do not, however, expressly preempt local action, nor does Article 32 conflict with them. The Bottle Bill imposes a deposit on "beverage container[s]," G.L. c. 94, § 323(a); but it defines the term "beverage" so as to exclude plain drinking water. Id. § 321.[18] Thus the operation of Article 32 will have no apparent adverse impact on the operation of the Bottle Bill's system for encouraging recycling.

As for "field preemption," we may assume for purposes of argument that the Bottle Bill was intended to occupy the field of, and ensure a uniform state system of, direct financial incentives for consumers to return beverage containers for recycling. But Article 32 does not

[17] "The objective of the bottle bill is to encourage the conservation of materials and energy, and to reduce litter, through the recycling and reuse of containers. To achieve this end, the statute provides a financial incentive, through deposits, refunds, and handling fees, to encourage the return of empty beverage containers." All Brands Container Recovery. Inc. v. Merrimack Valley Distributing Co., 54 Mass. App. Ct. 297, 298 (2002).

[18] That statute defines "beverage" as "soda water or similar carbonated soft drinks, mineral water, and beer and other malt beverages, but shall not include alcoholic beverages other than beer and malt beverages as defined in chapter one hundred and thirty-eight, dairy products, natural fruit juices or wine."

operate in that field. Rather, Article 32 seeks to reduce the generation of plastic bottles that must then be recycled or otherwise disposed of. Although the Bottle Bill and Article 32 share an overall goal of reducing the number of beverage containers that consumers introduce into the solid waste stream, they seek to accomplish that goal by entirely different mechanisms. The Bottle Bill embodies no legislative judgment that its consumer-paid deposit system shall be the uniform and only approach to achieving the goal just stated. The Bottle Bill's exclusion of certain beverage containers does not represent a legislative decision that disposal of those containers is not a matter of legitimate governmental concern.[19] The exclusion of certain containers (e.g., plastic drinking water bottles) does not represent a legislative decision to prohibit other steps that could reduce the number of those containers introduced into the solid waste stream.

c. Statutes and Regulations Concerning Bottled Water

We have also considered the possible preemptive effect of various state statutes and regulations concerning bottled drinking water. The bottling of drinking water within the Commonwealth requires a permit from the board of health in the municipality where the bottling facility is located, and persons or companies engaged in the business of bottling drinking water outside of the Commonwealth may not sell such water within the Commonwealth without a permit from the state Department of Public Health (DPH). G.L. c. 94, §§ 10A, 10B. Bottled water intended for human consumption must be tested periodically and labeled appropriately. Id. §§ 10D½, 10E½. As authorized by G.L. c. 94, § 10E, DPH has issued regulations to implement the foregoing statutes. 105 CMR §§ 570.001-570.031 ("Manufacture, Collection and Bottling of

[19] We are aware that the Legislature has rejected numerous efforts to extend the Bottle Bill's coverage to containers of beverages such as plain drinking water, juices, and sports drinks. This legislative decision that such containers should not be brought within the Bottle Bill's approach to encouraging recycling and reducing waste does not represent a decision that such non-covered containers do not pose a solid waste disposal problem or that cities and towns may not take steps (apart from imposing a consumer deposit system like the Bottle Bill's) to control that problem.

We have also been informed that in May 2012, the state Senate, in declining to adopt an amendment to the FY 13 state budget that would expand the Bottle Bill to cover bottled water, also declined to adopt an amendment that would ban the sale of bottled water unless such bottles were subject to the Bottle Bill. This occurred in the context of a budget debate that ultimately did not lead to any legislation addressing the Bottle Bill or bottled water. We cannot infer, from the rejection of such a conditional ban by one branch of the Legislature in these circumstances, any affirmative intent by the Legislature as a whole to preclude cities and towns from taking action in this area. Unenacted legislative proposals are usually an unreliable basis for determining legislative intent. E.g., Rosing v. Teachers' Retirement System, 458 Mass. 283, 294 n.12 (2010); Franklin v. Albert, 381 Mass. 611, 615-16 (1980). Likewise, we cannot find any preemptive intent based on the Legislature's ultimate failure to adopt a May 2012 Senate budget amendment to create a commission to study the sale of bottled water and the possible need for legislation to reduce the generation of associated solid waste.

Water and Non-carbonated Beverages"). "The purpose of these regulations is to establish standards for the manufacture, collection, bottling and labeling of bottled water and carbonated non-alcoholic beverages . . . to promote the underlying purpose of protecting the public health." Id. § § 570.001 (emphasis added). We find nothing in these statutes or regulations, however, that requires that bottled water be made available for sale in particular types of bottles (e.g., PET bottles of one liter or less), or that addresses the solid waste issues, as opposed to public health issues, that the sale of bottled water may create. [20] In short, these statutes and regulations do not preempt Article 32, either expressly, or by conflicting with Article 32, or by occupying any field in which Article 32 operates.

We have also reviewed G.L. c. 94, § 323A, which prohibits the sale of plastic containers in the Commonwealth, regardless of their contents and whether they contain beverages that are covered by the Bottle Bill, unless they include one of seven codes indicating the type of plastic of which the container is made, along with a triangle formed of three rounded arrows and commonly recognized as a symbol of recycling. One of the codes set forth in the statutes is the number "1," which indicates "PETE (polyethylene terephthalate)." Id. § 323A(a). This is apparently the same type of plastic as the "PET" addressed by Article 32. The obvious purpose of § 323A (which is placed between other sections of c. 94 that constitute the Bottle Bill, §§ 321-323E) is to allow the identification of different types of plastic containers if and when they must be separated for recycling purposes. We do not construe § 323A as embodying a legislative judgment that sales of containers manufactured out of any of the types of plastic listed therein must be permitted in the Commonwealth, regardless of their contents. Neither the words nor the placement of § 323A hints at any such purpose. Section 323A does not say that sales of plastic containers shall be permitted, provided that they are properly labeled. Rather, § 323A prohibits sales of plastic containers unless they are properly labeled. In short, § 323A does not expressly preempt local action regarding container sales; while it may well occupy the field of labeling plastic containers by the type of plastic involved, Article 32 does not enter that field; and Article 32 does not conflict with § 323A.

Finally, we have considered the possible preemptive effect of state Department of

[20] The same is true of various other DPH statutes and regulations that have been called to our attention. For example, DPH issues licenses to operate food and beverage vending machines, which may include machines that dispense bottled water (G.L. c. 94, §§ 308-313), but this licensing system appears to be primarily concerned with public health and other issues addressed in G.L. c. 94, not with the issue addressed by Article 32. See id. § 311(b) ("Whenever the commissioner [of DPH] finds that an operator has violated any applicable provision of this chapter or that unsanitary or other conditions exist in the operation of any vending machine or commissary, he shall issue a written notice . . . advising the operator that unless such violation and condition is corrected within a specified and reasonable period of time his license may be suspended or revoked"). The same may be said of DPH's regulation 105 CMR § 590.006(A), which concerns "bottled drinking water used or sold in a food establishment." This regulation is a part of 105 CMR Part 590, which establishes "Minimum Sanitation Standards for Food Establishments."

Environmental Protection (DEP) regulations under which DEP may "require a public water system to use bottled water, point-of-use devices, [or] point-of-entry devices as a condition of granting an exemption from the requirements of [other DEP regulations setting maximum contaminant levels or requiring certain treatment methods for piped water] to avoid an unreasonable risk to health." 310 CMR §§ 22.14(23)-(25).[21] We are not aware, however, that the Town has sought any such exemption or that DEP has identified the need for one. Nor is it clear that, if such an exemption were sought, DEP would mandate the use of bottled water (as opposed to point-of-entry or point-of-use devices), or that any such mandate would require that such water be furnished in PET bottles of one liter or less. The DEP regulation describing the use of bottled water as a condition for obtaining an exemption does not establish any requirements for the types or sizes of bottles to be used. Assuming arguendo that DEP were to require water to be furnished in PET bottles of one liter or less, there is room in Article 32, through the "exemption for emergencies" procedure in its section 2, and the "suspension" procedure in section 4, to allow such sales. Accordingly, we find no necessary conflict between the DEP regulations and Article 32, nor do those regulations preempt Article 32 expressly or by occupying any field in which Article 32 necessarily operates.

In sum, we are unable to conclude that Article 32 is preempted by or conflicts with any state statutes or regulations concerning bottle water.[22]

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[21] The regulations define a "Point-of-entry Treatment Device" as "a device installed to treat the water entering a house or building or portion of such for the purpose of reducing contaminants in the water distributed throughout the house or building or portion of such." Id. § 22.02(1). A "Point-of-use Treatment Device" is "a treatment device installed on a single faucet or spigot used for the purpose of reducing contaminants in drinking water at that one faucet or spigot." Id.

[22] It has been suggested to us that Article 32 may interfere with the performance of contracts that the Commonwealth has entered into with private vendors for the supply of bottled water to state agencies and institutions, which could include the Massachusetts Correctional Institution-Concord operated by the state Department of Correction (DOC), or the Concord District Court. We have reviewed the contracts (identified by the code "GRO 26"), the terms of which are available at https://www.ebidsourcing.com/displayPublicContSummView.do?doValidateToken=false&docViewType=ACTIVE&docId=120208&docStatus=ACTIVE&docUserId=3141&userType=PUBLIC (last visited August 1, 2012). It is unclear whether, under these contracts, any "sales" of the type prohibited by Article 32 occur in the Town, either by vendors to DOC or the Court, or by DOC or the Court to persons on state premises. We caution the Town that Article 32 should not be applied in a manner that would interfere with the essential governmental functions of DOC and the Court. A state agency is not subject to local regulations unless "those regulations do not interfere with its ability to fulfill its essential governmental purposes and have only a negligible effect on its operations." Town of Boxford v. Massachusetts Highway Department, 458 Mass. 596, 602 (2010) (citation and internal quotations omitted).

5. Home Rule Amendment Limitations

We have considered whether Article 32 is consistent with limitations established by the state constitution's Home Rule Amendment, Mass. Const. amend. art. 2 (as amended by amend. art. 89). Generally, "[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court[.]" Id. § 6. However, "[n]othing in this article shall be deemed to grant to any city or town the power . . . (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power[.]" Id. § 7(5). Although a proviso to § 7 allows the Legislature to grant such power, we are unaware of any legislation doing so in this context. As explained below, however, we conclude that, even accepting the doubtful proposition that Article 32 constitutes "private or civil law governing civil relationships," any such aspect of Article 32 is valid, as "an incident to an exercise of an independent municipal power." We also conclude that Article 32 is consistent with various other Home Rule Amendment limitations that have been cited to us.

a. Private or Civil Law Governing Civil Relationships

The Supreme Judicial Court first interpreted the meaning of the "private or civil law" clause in Marshal House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 709 (1970), where the court held that a by-law enacting a form of rent control was an impermissible private or civil law governing a civil relationship. The Marshal House court acknowledged that "[a]mbiguity exists . . . concerning the meaning of . . . § 7(5)." Id. at 713. The court was "faced with interpreting novel and very general language concerning which there exist only inconclusive indications concerning the intentions of the [Home Rule Amendment's] draftsmen." Id. at 714.

Nonetheless, the court concluded that "[t]he term 'private or civil law governing civil relationships' is broad enough to include law controlling ordinary and usual relationships between landlords and tenants." Id. at 716. The court noted that although the by-law contained some provisions for public enforcement (by the rent review and grievance board), "the method adopted is primarily civil in that it affords to the board power in effect to remake, in important respects, the parties' contract creating a tenancy." Id. In contrast to, for example, the "regulation of a temporary relationship between [a] taxi operator and his customer," the by-law "more directly intervenes in the continuing landlord-tenant relationship." Id. at 715. It is now well established that local enactments that affect the landlord-tenant relationship by, e.g., imposing rent control or regulating condominium conversions, are 'private or civil law governing civil relationships.'" Bannerman v. City of Fall River, 391 Mass. 328, 330-31 (1984) (citing Marshal House and CHR General, Inc. v. Newton, 387 Mass. 351, 354 (1982)).

In contrast, in Bloom, 363 Mass. 136, the court held that an ordinance establishing a municipal human rights commission was not an enactment of private or civil law governing a civil relationship. The court distinguished Marshal House on the grounds that "[n]o new rights or obligations between persons are created by the ordinance; no existing rights or obligations between persons are modified or abolished." Bloom, 363 Mass. at 146.

Together, Marshal House and Bloom suggest certain distinguishing features of private or civil laws governing civil relationships. An enactment that "remake[s], in important respects," a private agreement governing a "continuing . . . relationship," and which is enforced through means "predominantly civil in character" (i.e., through the parties' own enforcement of the agreement) is likely a private or civil law governing a civil relationship. See Marshal House, 357 Mass. at 716-17. (To date, Massachusetts courts have not applied the limitation on private or civil law governing civil relationships to any relationship other than the landlord-tenant relationship.) In contrast, an enactment in which "[n]o new rights or obligations between persons are created [and] no existing rights or obligations between persons are modified or abolished," Bloom, 363 Mass. at 146, is likely not a private or civil law governing a civil relationship.

This conception of private or civil law is consistent with that offered by other legal authorities. The court in Bloom, 346 Mass. at 146 n.6, cited Note, Municipal Home Rule Power: Impact on Private Legal Relationships, 56 Iowa L. Rev. 631 (1971), which states that "a municipality is considered to have enacted private law when an ordinance significantly affects private legal relationships . . . ." Id. at 631. "Broadly defined, private law is the law governing civil relationships, including such fields as tort, contract, and property law." Id. (footnote omitted). The "private or civil law" limitation on home rule powers grows out of "social and economic considerations of uniformity, certainty, and predictability in private legal relationships . . . . For example, the effect of a different law of contracts or torts in each city would obviously be chaotic." Id. at 632. As another commentator has stated, "Private law consists of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another." Gary T. Schwartz, The Logic of Home Rule and the Private Law Exception, 20 UCLA L. Rev. 671, 688 (1973). Examples include "contracts, property, and torts." Id. at 687. According to a third commentator, "Obviously, we do not wish to give our cities the power to enact a distinctive law of contracts, for example. On the other hand, the exercise of municipal powers is very likely to have important bearings upon private interests and relationships. The approach of the . . . [language now in § 7(5) of the Home Rule Amendment] is to strike a balance . . . ." Jefferson B. Fordham, Home Rule-AMA Model, 44 Natl. Municipal Rev. 137, 142 (1955) (quoted in Marshal House, 357 Mass. at 714).

Here, Article 32 does not appear to meet any of the criteria that identify "private or civil law governing civil relationships." First, it does not remake, in any important respect, any private agreement governing a continuing relationship. The "relationship" between a merchant wishing to sell drinking water in PET bottles of one liter or less and a customer wishing to buy it is not, to our knowledge, ordinarily governed by any continuing contract; rather, it is a "temporary relationship," more akin to that "between [a] taxi operator and his customer" than to the landlord-tenant relationship. Marshal House, 357 Mass. at 715. Second, prohibiting the merchant from selling such bottled water does not appear, in any meaningful way, to create or modify any "rights" or "obligations" between private persons. Merchants and customers certainly have expectations that lawful products may be freely bought and sold, but these are not "rights" or "obligations," absent some law or contract so declaring, and we are aware of none. Third, Article 32 is not a form of contract, property, or tort law. At most, by prohibiting sales of a certain category of bottled water, it indirectly prohibits the formation of contracts for such

sales.

Finally, Article 32's enforcement mechanism also suggests that it is not a "private or civil law governing civil relationships." Article 32 is not enforceable through "lawsuits brought by one private entity against another." The Logic of Home Rule and the Private Law Exception, 20 UCLA L. Rev. at 688 (stating that such a private enforcement mechanism is one feature of "private or civil law"). Rather, enforcement of Article 32 "is the responsibility of the Town Manager or his/her designee," through a system of warnings and "fines paid to the Town of Concord." See Article 32, § 3 & Amendment to Appendix A of Town's Non-Criminal Disposition Bylaw. Although the existence of such a public enforcement mechanism is not dispositive where a local enactment operates primarily by remaking the terms of a private legal relationship, Marshal House, 357 Mass. at 716-17, that is not the case here. Judging by its enforcement mechanism, Article 32 establishes a duty running from merchants to the Town, not from merchants to their customers. In sum, we cannot conclude that Article 32 constitutes "private or civil law governing civil relationships."

b. Exercise of an Independent Municipal Power

Even if Article 32 constituted "private or civil law governing civil relationships," any such aspect of Article 32 is "an incident to an exercise of an independent municipal power"--here, the power to regulate the generation of solid waste within the Town. As the court stated in Marshal House,

> Doubtless, under art. 89, § 6, a town possesses (subject to applicable constitutional provisions and legislation) broad powers to adopt by-laws for the protection of the public health, morals, safety, and general welfare, of a type often referred to as the 'police' power. We assume that these broad powers would permit adopting a by-law requiring landlords (so far as legislation does not control the matter) to take particular precautions to protect tenants against injury from fire, badly lighted common passageways, and similar hazards. Such by-laws, although affecting the circumstances of a tenancy, would do so (more clearly than in the case of the present [rent-control] by-law) as an incident to the exercising of a particular aspect of the police power.

Marshal House, 357 Mass. at 717-18. To be sure, "a municipal civil law regulating a civil relationship is permissible (without prior legislative authorization) only as an incident to the exercise of some independent, individual component of the municipal police power." Id. at 718 (emphasis added).

> We conclude that it would be, in effect, a contradiction (or circuitous) to say that a by-law, the principal objective and consequence of which is to control rent payments, is also merely incidental to the exercise of an independent municipal power to control rents. We perceive no component of the general municipal police power, other than the regulation of rents itself, to which such regulation fairly could be said to be incidental.

Id. at 718 (footnote omitted); see Bannerman, 391 Mass. at 332 (condominium conversion

ordinance could not be justified as incident to exercise of city's power to "[f]urther[] . . . the general public welfare," but instead must be based on an 'individual component of the [city']s police power'") (quoting Marshal House).

Here, unlike in Marshal House, any effect that Article 32 has on private civil relationships between merchants and customers is incidental to the exercise of the Town's independent power to regulate the generation of solid waste--a separate component of its police power that has no necessary link to regulating relationships between merchants and customers. Article 32 is akin to the hypothetical by-law in Marshal House, requiring landlords to "to take particular precautions to protect tenants against injury from fire" and similar hazards--a by-law that the court assumed would be a valid "exercise[e] of a particular aspect of the police power" even though the by-law would incidentally "affect[] the circumstances of a tenancy." Marshal House, 357 Mass. at 717-18.

The Supreme Judicial Court has appeared to accept that a municipality's "power to operate [a] water and sewer system" and its "power to regulate traffic and city streets" would constitute "individual component[s] of the [municipality's] police power," that is, "independent municipal power[s]." Bannerman, 391 Mass. at 332 (finding, however, that challenged condominium conversion ordinance was not, in the circumstances, an exercise of those powers).[23] We conclude that the Town's power to control the generation of solid waste within its borders is, likewise, an "independent, individual component of the municipal police power." See Marshal House, 357 Mass. at 718. Article 32 appears to be a valid exercise of that power, to which any effect on private civil relationships is incidental.

c. Other Home Rule Amendment Limitations

We have also considered the argument that Article 32 is invalid because it is unauthorized by G.L. c. 40, § 21, which, it has been argued to us, "implements" the Home Rule Amendment. That statute lists a number of subjects on which municipalities may enact ordinances and by-laws, in some cases subject to certain express limitations. But the statute pre-dates the 1966 adoption of the Home Rule Amendment. See, e.g., G.L. c. 40, § 21 (Ter. Ed. 1932). In light of that Amendment's authorization to each municipality to legislatively "exercise any power or function which the general court has power to confer upon it," amend. art. 2, § 6 (as inserted by amend. art. 89)--whether or not the general court has actually done so--G.L. c. 40, § 21 cannot be read to preclude, by implication, ordinances and by-laws on subjects not listed therein. See generally Bloom, 363 Mass. at 157.

In any event, G.L. c. 40, § 21(1), authorizes municipalities to adopt ordinances and by-laws "[f]or directing and managing their prudential affairs, preserving peace and good order, and maintaining their internal police." The phrase "internal police" refers not to municipal police

[23] See also CHR General, 387 Mass. at 356 (municipal zoning power was an "independent municipal power," although challenged condominium conversion ordinance was not, in the circumstances, an exercise of that power).

departments but is, instead, "a term sometimes applied to the police power, or power to enact laws in the interest of the public safety, health, and morality[.]" Black's Law Dictionary 732 (5th ed. 1979). As discussed above, we conclude that Article 32 is a valid exercise of the Town's police power. Thus, Article 32 is within the terms of G.L. c. 40, § 21, although that is not necessary to Article 32's validity.

We also do not accept the argument that Article 32 violates the Home Rule Amendment by restricting traffic between municipalities or regulating activities outside Town boundaries. See Beard v. Town of Salisbury, 378 Mass. 435, 440-41 (1979) (neither statute nor Home Rule Amendment authorized municipality to regulate either inter-municipal traffic or areas outside municipality's boundaries). Article 32 may, or may not, have the effect of reducing the number of delivery trucks traveling from other municipalities to the Town, but it does not purport to regulate such traffic. Nor does Article 32's prohibition on sales of bottled water "in the Town of Concord," Article 32, § 1, purport to regulate sales occurring in other municipalities. Questions may arise about where particular sales occur for purposes of Article 32--an issue that we address immediately below--but the possibility of such questions does not lead to the conclusion that Article 32 prohibits sales occurring outside Town boundaries.

6. Vagueness

We have considered the argument that Article 32 is unconstitutionally vague, because it (a) does not define what constitutes a sale "in the Town of Concord," (b) does not define what constitutes "drinking water," and (c) does not provide for any means to notify merchants about which bottles are "polyethylene terephthalate (PET) bottles," all of which phrases are used in the sales prohibition set forth in Article 32, § 1. We are unable to agree with these contentions.

Under the "void for vagueness" doctrine, a law that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Commonwealth v. Carpenter, 325 Mass. 519, 521 (1950) (citation and internal quotations omitted). Vague laws violate due process because individuals do not receive fair notice of the conduct proscribed by the law, id., and because vague laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement. Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-64 (1973).

Nevertheless, "proscribed conduct is not always capable of precise legal definition"; "mathematical precision" is not required; and a law is not vague "if it requires a person to conform his conduct to an imprecise but comprehensible normative standard[.]" Commonwealth v. Williams, 395 Mass. 302, 304 (1985) (citations and internal quotations omitted). "Uncertainty as to whether marginal offenses are included within the coverage of a statute does not render it unconstitutional if its scope is substantially clear." Commonwealth v. Bohmer, 374 Mass. 368, 372 (1978). "The fact that close questions may arise in determining [the existence of violations] does not render the statute unconstitutionally vague." Opinion of the Justices, 378 Mass. 822, 827 (1979). Particularly where statutes regulating business activities are concerned, "the due process clause does not require great exactitude," and "the meaning and application of terms must be arrived at by . . . the gradual process of judicial inclusion and exclusion." Commonwealth v. Gustafsson, 370 Mass. 181, 187 (1976) (citations and internal quotations

omitted).

Judged against these standards, Article 32 is not unconstitutionally vague. First, it is clear enough that where both the transfer from seller to buyer of a bottle of water and the buyer's payment to the seller occur within the Town, the sale has occurred within the Town. Closer questions may arise where either the transfer or the payment occurs outside of the Town, but these may be resolved if and when they arise in an enforcement action. Gustafsson, 370 Mass. at 187. The Town is presumed to be aware that it cannot regulate activities occurring outside of Town boundaries. See Beard, 378 Mass. at 440-41. Moreover, the only consequence of first offense is a warning (see Article 32, Amendment to Appendix A of Town's Non-Criminal Disposition Bylaw), meaning that merchants will be on sufficient notice, before being subject to any monetary penalty, that the Town considers them to have violated Article 32. Ambiguities in business regulations may be clarified through the administrative process so as to avoid a vagueness claim, see MFT, 436 Mass. at 781, and Article 32's warning mechanism appears sufficient to accomplish this result.

Second, the argument that Article 32's phrase "drinking water" is unconstitutionally vague is both unpersuasive standing alone, and misses the point that Article 32 more specifically prohibits the sale of "non-sparkling, unflavored drinking water in single-serving polyethylene terephthalate (PET) bottles of 1 liter (34 ounces) or less[.]" This phrase does not require persons "of common intelligence" to "guess at its meaning and differ as to its application[.]" Carpenter, 325 Mass. at 521. We do not see any significant uncertainty in what types of bottled water are and are not subject to Article 32. The argument made to us that bottled water suitable for drinking may in fact be purchased for other uses (e.g., cooking, washing, bathing an infant), and therefore is not "drinking water" within the meaning of Article 32, appears strained. If such a case arises, the applicability of Article 32 may be clarified by its warning process and by case-by-case adjudication.

The argument that merchants may be unaware of whether particular plastic bottles are made of polyethylene terephthalate (PET) is answered by the requirement of G.L. c. 94, § 323A, discussed above, that all plastic containers sold in the Commonwealth be labeled with a code identifying the type of plastic of which they are made. Section 323A requires that polyethylene terephthalate containers be identified by the code number "1" along with the triangular recycling symbol. Any remaining questions on this issue may, as noted above, be clarified by the warning process contemplated by Article 32 and by case-by-case adjudication.

We do note that some question may arise about the scope of the "Exemption for Emergencies" established by Article 32. Section 2 of Article 32 provides:

> Sales occurring subsequent to a declaration of an emergency adversely affecting the availability and/or quality of drinking water to Concord residents by the Emergency Management Director or other duly-authorized Town, Commonwealth or United States official shall be exempt from this Bylaw until seven days after such declaration has ended.

It is unclear whether, in order to trigger this exemption, a declaration of emergency must specifically state that the emergency is one "adversely affecting the availability and/or quality of

drinking water to Concord residents," or whether merchants are left to make that judgment themselves whenever an emergency is declared. We caution the Town to apply this language in a manner that provides fair notice of when a Section 2 exemption is and is not in effect.

7. Violation of Public Policy

Finally, it has been argued to us that Article 32 violates public policy in that it unduly interferes with Town residents' and visitors' access to drinking water. It is suggested that tap water may not be a viable option for individuals with compromised immune systems or chemical sensitivities; that bottled water is the safest and most sanitary way of furnishing a healthful beverage to Emerson Hospital's patients, visitors, and staff; and that Article 32 will interfere with emergency preparedness and response.

We respect the force of these objections and the sincerity with which they have been advanced. But they go to the wisdom, not the legality, of Article 32. Public policy is ordinarily derived from the laws (e.g., King v. Driscoll, 418 Mass. 576, 582-84 (1994)), rather than furnishing a basis to invalidate them. The Attorney General has no authority to disapprove a by-law on the ground that it may be unwise or may not comport with the Attorney General's or citizens' views of appropriate policy. See Amherst, 398 Mass. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.")

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,

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